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12

13 UNITED STATES DISTRICT COURT FOR THE
14 EASTERN DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,) No. 2:06-CV-00387-MCE-
16 Plaintiff,) JFM
17 v.)
18) CONSENT DECREE
19 HONEYWELL INTERNATIONAL, INC.,)
ALPHEUS KAPLAN, NEHEMIAH)
20 DEVELOPMENT COMPANY,)
Defendants.)
21

CERCLA SECTION 107 CONSENT DECREE
FOR RECOVERY OF RESPONSE COSTS

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3 I. BACKGROUND
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5 A. The United States of America ("United States"), on
6 behalf of the Administrator of the United States Environmental
7 Protection Agency ("EPA"), filed a complaint in this matter
8 pursuant to Section 107 of the Comprehensive Environmental
9 Response, Compensation, and Liability Act of 1980, 42 U.S.C. §
10 9607, as amended ("CERCLA"), seeking reimbursement of response
11 costs incurred or to be incurred for response actions taken at or
12 in connection with the release or threatened release of hazardous
13 substances at the Central Eureka Mine Superfund Site in Amador
14 County, California.

15 B. By entering into this Consent Decree, Defendant
16 Honeywell International, Inc. ("Settling Defendant") does not
17 admit any liability to Plaintiff arising out of the transactions
18 or occurrences alleged in the Complaint.

19 C. The United States and Settling Defendant agree, and this
20 Court by entering this Consent Decree finds, that this Consent
21 Decree has been negotiated by the Parties in good faith, that
22 settlement of this matter will avoid prolonged and complicated
23 litigation between the Parties, and that this Consent Decree is
24 fair, reasonable, and in the public interest.

25 THEREFORE, with the consent of the Parties to this Decree,
26 it is ORDERED, ADJUDGED, AND DECREED:
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II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaint, Settling Defendant waives all objections and defenses that Settling Defendant may have to jurisdiction of the Court or to venue in this District. Settling Defendant shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States, and upon Settling Defendant and its successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendant under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

1 a. "CERCLA" shall mean the Comprehensive Environmental
2 Response, Compensation, and Liability Act of 1980, as amended, 42
3 U.S.C. § 9601, et seq.

4 b. "Consent Decree" shall mean this Consent Decree and
5 all appendices attached hereto. In the event of conflict between
6 this Consent Decree and any appendix, the Consent Decree shall
7 control.

8 c. "Day" shall mean a calendar day. In computing any
9 period of time under this Consent Decree, where the last day
10 would fall on a Saturday, Sunday, or federal holiday, the period
11 shall run until the close of business of the next working day.

12 d. "DOJ" shall mean the United States Department of
13 Justice and any successor departments, agencies or
14 instrumentalities of the United States.

15 e. "EPA" shall mean the United States Environmental
16 Protection Agency and any successor departments, agencies or
17 instrumentalities of the United States.

18 f. "EPA Hazardous Substance Superfund" shall mean the
19 Hazardous Substance Superfund established by the Internal Revenue
20 Code, 26 U.S.C. § 9507.

21 g. "Interest" shall mean interest at the rate
22 specified for interest on investments of the EPA Hazardous
23 Substance Superfund established by 26 U.S.C. § 9507, compounded
24 annually on October 1 of each year, in accordance with 42 U.S.C.
25 § 9607(a). The applicable rate of interest shall be the rate in
26 effect at the time the interest accrues. The rate of interest is
27 subject to change on October 1 of each year.

1 h. "Paragraph" shall mean a portion of this Consent
2 Decree identified by an Arabic numeral or an upper or lower case
3 letter.

4 i. "Parties" shall mean the United States and Settling
5 Defendant.

6 j. "Past Response Costs" shall mean all costs,
7 including but not limited to direct and indirect costs, including
8 enforcement costs, that EPA or DOJ on behalf of EPA or any other
9 person has paid or incurred at or in connection with the Site
10 through August 7, 2006, plus accrued Interest on all such costs
11 through such date.

12 k. "Plaintiff" shall mean the United States.

13 l. "Section" shall mean a portion of this Consent
14 Decree identified by a Roman numeral.

15 m. "Settling Defendant" shall mean Honeywell
16 International, Inc.

17 n. "Site" shall mean the Central Eureka Mine CERCLA
18 Site, located along Highway 49 near the city of Sutter Creek,
19 Amador County, California, and generally designated by the
20 following property description: the minehead area located on the
21 east side of Sutter Hill road, the Mesa de Oro tailings
22 impoundment area and surrounding subdivisions generally located
23 near the intersection of Highway 49 and Bryson Drive, and the
24 Allen Ranch tailings area, located approximately one half mile
25 west of Allen Ranch Road, and two miles north of State Route 104.
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1 o. "United States" shall mean the United States of
2 America, including its departments, agencies and
3 instrumentalities.

4 **V. PAYMENT OF PAST RESPONSE COSTS**

5 4. Payment of Past Response Costs to EPA. If the Consent
6 Decree is entered by the Court, Settling Defendant shall, within
7 15 Days thereof, make payment to EPA in the amount of \$2,000,000
8 plus interest accrued since the lodging of the Consent Decree, in
9 accordance with Paragraphs 5 and 6 below.

10 5. The Payment referenced in Paragraph 4 shall be made by
11 FedWire Electronic Funds Transfer ("EFT") to the Federal Reserve
12 Bank of New York, ABA = 021030004, Account No. 68010727, 33
13 Liberty Street, New York, NY 10045. Field Tag 4200 of the
14 FedWire message should read, "D 68010727 Environmental Protection
15 Agency."

16 6. At the time of payment, Settling Defendant shall also
17 send notice that payment has been made to EPA and DOJ in
18 accordance with Section XII (Notices and Submissions). Such
19 notice shall reference the EPA Region and Site/Spill
20 Identification Number 09AQ, DOJ case number 90-11-3-1692/1, and
21 the civil action number.

22 7. The total amount to be paid pursuant to Paragraph 4,
23 \$2,000,000, plus interest, shall be deposited in the EPA
24 Hazardous Substance Superfund.

25 **VI. FAILURE TO COMPLY WITH CONSENT DECREE**

26 8. Interest on Late Payments. If Settling Defendant fails
27 to make any payment under Paragraph 4 (Payment of Past Response
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Costs) by the required due date, Interest shall continue to
accrue on the unpaid balance through the date of payment.

9. Stipulated Penalty.

a. If any amounts due under Paragraph 4 are not paid
by the required date, Settling Defendant shall be in violation of
this Consent Decree and shall pay to EPA, as a stipulated
penalty, in addition to the Interest required by Paragraph 8,
\$500 per violation per day that such payment is late.

b. Stipulated penalties are due and payable within 30
days of the date of the demand for payment of the penalties by
EPA. All payments to EPA under this Paragraph shall be
identified as "stipulated penalties" and shall be made by
certified or cashier's check made payable to "EPA Hazardous
Substance Superfund." The check, or a letter accompanying the
check, shall reference the name and address of the party(ies)
making payment, the Site name, the EPA Region and Site Spill ID
Number 09AQ, DOJ Case Number 90-11-3-1692/1, and the civil action
number. Settling Defendant shall send the check (and any
accompanying letter) by United States mail to:

U.S. Environmental Protection Agency
Region 9 Superfund Receivable
P.O. Box 371099M
Pittsburgh, PA 15251

c. At the time of each payment, Settling Defendant
shall also send notice that payment has been made to EPA and DOJ
in accordance with Section XII (Notices and Submissions). Such
notice shall reference the EPA Region and Site/Spill ID Number
09AQ, DOJ Case Number 90-11-3-1692/1, and the civil action
number.

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Defendant of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

10. If the United States brings an action to enforce this Consent Decree, Settling Defendant shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

11. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to comply with the requirements of this Consent Decree.

12. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Settling Defendant from payment as required by Section V or from performance of any other requirements of this Consent Decree.

VII. COVENANT NOT TO SUE BY PLAINTIFF

13. Covenant Not to Sue by United States. Except as specifically provided in Section VIII (Reservation of Rights by United States), the United States covenants not to sue or to take

1 administrative action against Settling Defendant pursuant to
2 Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past
3 Response Costs. This covenant not to sue shall take effect upon
4 receipt by EPA of all payments required by Section V, Paragraph 4
5 (Payment of Past Response Costs) and any amount due under Section
6 VI (Failure to Comply with Consent Decree). This covenant not to
7 sue is conditioned upon the satisfactory performance by Settling
8 Defendant of its obligations under this Consent Decree. This
9 covenant not to sue extends only to Settling Defendant and does
10 not extend to any other person.

11 **VIII. RESERVATIONS OF RIGHTS BY UNITED STATES**

12 14. The United States reserves, and this Consent Decree is
13 without prejudice to, all rights against Settling Defendant with
14 respect to all matters not expressly included within the Covenant
15 Not to Sue by Plaintiff in Paragraph 13. Notwithstanding any
16 other provision of this Consent Decree, the United States
17 reserves all rights against Settling Defendant with respect to:

18 a. liability for failure of Settling Defendant to meet
19 a requirement of this Consent Decree;

20 b. liability for costs incurred or to be incurred by
21 the United States that are not within the definition of Past
22 Response Costs;

23 c. liability for injunctive relief or administrative
24 order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;

25 d. criminal liability; and
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1 e. liability for damages for injury to, destruction
2 of, or loss of natural resources, and for the costs of any
3 natural resource damage assessments.

4 **IX. COVENANT NOT TO SUE BY SETTLING DEFENDANT**

5 15. Settling Defendant covenants not to sue and agrees not
6 to assert any claims or causes of action against the United
7 States, or its contractors or employees, with respect to Past
8 Response Costs or this Consent Decree, including but not limited
9 to:

10 a. any direct or indirect claim for reimbursement from
11 the Hazardous Substance Superfund based on Sections 106(b)(2),
12 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607,
13 9611, 9612, or 9613, or any other provision of law;

14 b. any claim arising out of the response actions at
15 the Site for which the Past Response Costs were incurred,
16 including any claim under the United States Constitution, the
17 Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28
18 U.S.C. § 2412, as amended, or at common law; or

19 c. any claim against the United States pursuant to
20 Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613,
21 relating to Past Response Costs.

22 16. Nothing in this Consent Decree shall be deemed to
23 constitute approval or preauthorization of a claim within the
24 meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R.
25 300.700(d).

26 17. Settling Defendant agrees not to assert any claims and
27 to waive all claims or causes of action that Settling Defendant
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1 may have for all matters relating to the Site, including for
2 contribution, against any person that has entered into a final de
3 *minimis* settlement under Section 122(g) of CERCLA, 42 U.S.C. §
4 9622(g), with EPA with respect to the Site as of the date of
5 entry of the Consent Decree. This waiver shall not apply with
6 respect to any defense, claim, or cause of action that Settling
7 Defendant may have against any person if such person asserts a
8 claim or cause of action relating to the Site against Settling
9 Defendant.

10 **X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

11 18. Except as provided in Paragraph 17 (*De Minimis* Waiver),
12 nothing in this Consent Decree shall be construed to create any
13 rights in, or grant any cause of action to, any person not a
14 Party to this Consent Decree. Except as provided in Paragraph 17
15 (*De Minimis* Waiver), the Parties expressly reserve any and all
16 rights (including, but not limited to, any right to
17 contribution), defenses, claims, demands, and causes of action
18 that they may have with respect to any matter, transaction, or
19 occurrence relating in any way to the Site against any person not
20 a party hereto.

21 19. The Parties agree, and by entering this Consent Decree
22 this Court finds, that Settling Defendant is entitled, as of the
23 date of entry of this Consent Decree, to protection from
24 contribution actions or claims as provided by Section 113(f)(2)
25 of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in
26 this Consent Decree. The "matters addressed" in this Consent
27 Decree are Past Response Costs.

20. Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify EPA and DOJ in writing no later than 60 days prior to the initiation of such suit or claim.

Settling Defendant also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA and DOJ in writing within 20 days of service of the complaint or claim upon it. In addition, Settling Defendant shall notify EPA and DOJ within 15 days of service or receipt of any Motion for Summary Judgment, and within 20 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

21. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects or limits the enforceability of the Covenant Not to Sue by Plaintiff set forth in Section VII.

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1 reasonable opportunity to dispute the privilege claim and any
2 such dispute has been resolved in the Settling Defendant's favor.

3 However, no records created or generated pursuant to the
4 requirements of this or any other settlement with the EPA
5 pertaining to the Site shall be withheld on the grounds that they
6 are privileged.

7 24. Settling Defendant hereby certifies that, to the best
8 of its knowledge and belief, after reasonable inquiry, it has not
9 altered, mutilated, discarded, destroyed or otherwise disposed of
10 any records, reports, or information relating to its potential
11 liability regarding the Site since notification of potential
12 liability by the United States or the State or the filing of suit
13 against it regarding the Site and that it has fully complied with
14 any and all EPA requests for information pursuant to Sections
15 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e),
16 and Section 3007 of RCRA, 42 U.S.C. § 6972.

17 **XII. NOTICES AND SUBMISSIONS**

18 25. Whenever, under the terms of this Consent Decree,
19 notice is required to be given or a document is required to be
20 sent by one party to another, it shall be directed to the
21 individuals at the addresses specified below, unless those
22 individuals or their successors give notice of a change to the
23 other Party in writing. Written notice as specified herein shall
24 constitute complete satisfaction of any written notice
25 requirement of the Consent Decree with respect to the United
26 States, EPA, DOJ, and Settling Defendant, respectively.
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As to the United States:

As to DOJ:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice (DJ # 90-11-2-07733)
P.O. Box 7611
Washington, D.C. 20044-7611

As to EPA:

Chris Reiner
Civil Investigator
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105
Larry Bradfish
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

As to Settling Defendant:

Tao Wu
Remediation Manager
Honeywell International, Inc.
111 South 34th Street, Bld. 158
Phoenix, AZ 85034

With a copy to:

Kenneth J. Berke
Berke, Kent & Ward, LLP
23975 Park Sorrento, Suite 200
Calabasas, CA 91302

XIII. RETENTION OF JURISDICTION

26. This Court shall retain jurisdiction over this matter
for the purpose of interpreting and enforcing the terms of this
Consent Decree.

XIV. INTEGRATION/APPENDIX

1 27. This Consent Decree constitutes the final, complete
2 and exclusive agreement and understanding between the Parties
3 with respect to the settlement embodied in this Consent Decree.
4 The Parties acknowledge that there are no representations,
5 agreements or understandings relating to the settlement other
6 than those expressly contained in this Consent Decree.

7 **XV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

8 28. This Consent Decree shall be lodged with the Court for
9 a period of not less than 30 days for public notice and comment.

10 The United States reserves the right to withdraw or withhold its
11 consent if the comments regarding the Consent Decree disclose
12 facts or considerations which indicate that this Consent Decree
13 is inappropriate, improper, or inadequate. Settling Defendant
14 consents to the entry of this Consent Decree without further
15 notice.

16 29. If for any reason this Court should decline to approve
17 this Consent Decree in the form presented, this agreement is
18 voidable at the sole discretion of any party and the terms of the
19 agreement may not be used as evidence in any litigation between
20 the Parties.

21 **XVI. SIGNATORIES/SERVICE**

22 30. The undersigned representative of Settling Defendant to
23 this Consent Decree and the Assistant Attorney General for the
24 Environment and Natural Resources Division of the United States
25 Department of Justice certifies that he or she is authorized to
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1 enter into the terms and conditions of this Consent Decree and to
2 execute and bind legally such Party to this document.

3 31. Settling Defendant hereby agrees not to oppose entry of
4 this Consent Decree by this Court or to challenge any provision
5 of this Consent Decree, unless the United States has notified
6 Settling Defendant in writing that it no longer supports entry of
7 the Consent Decree.

8 32. Settling Defendant shall identify, on the attached
9 signature page, the name and address of an agent who is
10 authorized to accept service of process by mail on behalf of that
11 Party with respect to all matters arising under or relating to
12 this Consent Decree.

13 **XVII. FINAL JUDGMENT**

14 33. Upon approval and entry of this Consent Decree by the
15 Court, this Consent Decree shall constitute the final judgment
16 between and among the United States and Settling Defendant. The
17 Court finds that there is no just reason for delay and therefore
18 enters this judgment as a final judgment under Fed. R. Civ. P. 54
19 and 58.
20

21 SO ORDERED THIS _____ DAY OF _____, 20__ .
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25 United States District Judge
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1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the
2 matter of United States v. Honeywell International, Inc., No.
3 2:06-CV-00387-MCE-JFM, relating to the Central Eureka Mine
4 Superfund Site.

5 FOR THE UNITED STATES OF
6 AMERICA

7 Date: _____

8 ~~Sue Ellen Wooldridge~~
9 Assistant Attorney General
10 Environment and Natural Resources
11 Division
12 U.S. Department of Justice
13 Washington, D.C. 20530

14 McGREGOR W. SCOTT
15 United States Attorney
16 Eastern District of California

17 By: _____

18 Edmund Brennan
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23 ~~Katherine Konschnik~~
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13 75 Hawthorne Street
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FOR HONEYWELL INTERNATIONAL,
INC.

Tao Wu
Remediation Manager
Honeywell International, Inc.
111 South 34th Street, Bld. 158
Phoenix, AZ 85034

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